CITIZENS AGAINST GOVERNMENT WASTE

Thomas A. Schatz
President

August 15, 2017

Chairman Ajit Pai
Commissioner Mignon Clyburn
Commissioner Michael O'Rielly
Commission Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: Restoring Internet Freedom (WC Docket No. 17-108)

Dear Chairman Pai, Commissioner Clyburn, and Commissioner O'Rielly:

On behalf of the more than one million members and supporters of Citizens Against Government Waste, I submit the attached public reply comments to the Federal Communications Commission in reference to the Notice of Proposal Rulemaking in the Matter of Restoring Internet Freedom (WC Docket No. 17-108).

If you have any questions or concerns, please contact either myself or Deborah Collier at (202) 467-5300. Thank you for your consideration of our remarks.

Sincerely,

Thomas Schatz

President
Citizens Against Government Waste

1100 Connecticut Avenue, N.W.
Suite 650
Washington, D.C. 20036
202-467-5300

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

Reply Comments of
Thomas A. Schatz
President
Citizens Against Government Waste

August 15, 2017

Citizens Against Government Waste (CAGW) is a private, nonprofit, nonpartisan organization dedicated to educating the American public about waste, mismanagement, and inefficiency in government. On behalf of the more than one million members and supporters of CAGW, I offer the following comments relating to the consumer protection aspects of the Matter of Restoring Internet Freedom (WC Docket No. 17-108).

The Federal Communications Commission (FCC) voted on February 26, 2015 to adopt the Open Internet Order (OIO) on a 3-2 party-line vote, reclassifying the internet as a telecommunications/telephone service under Title II of the Communications Act of 1934.[1] This utility-style big brother approach to regulating the internet was a problem in search of a solution, and a massive overreach of authority by the agency.

The adoption of the OIO stemmed in part from a misguided belief that since a company might have the capability of doing harm to its customers and subscribers, it will do so. Not only did the OIO create rules for only internet service providers (ISPs) that differed from the rules for the rest of the internet ecosystem, it also created problems for consumer protection and privacy.

[1] In the Matter of Protecting and Promoting the Open Internet (GN Docket No. 14-28), Federal Communications Commission, FCC 15-24, February 26, 2015, https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

On July 10, 2017, South Carolina State Representative Garry R. Smith (District 27 – Greenville County) filed comments with the FCC regarding this proceeding. Rep. Smith noted that an inquiry with the South Carolina Attorney General's Office and the Department of Consumer Affairs found only a "handful of internet-related complaints, most of which related to billing practices, internet service speed, or improper representations of available internet service speeds. The state entities were unable to identify any actual harms resulting from light-touch regulation. In fact, quite the contrary is true. The entities identified several specific instances of actual consumer harm, which harms ISPs addressed through the consumer complaint administrative processes."[2] Rep. Smith further noted that based on information he received from the South Carolina State Attorney General's office, "South Carolinians have not experienced any of the hypothetical harms recited in the Title II Order."[3] (Rep. Smith's full comments appear in Appendix A of this filing).

On July 17, 2017, Federal Trade Commission (FTC) Acting Chairman Maureen Ohlhausen filed comments relating to the Restoring Internet Freedom NPRM. She referred to the June 2007 FTC Staff Report, "Broadband Connectivity Competition Policy,"[4] and noted, "Ten years later, the 2007 FTC Staff Report remains remarkably relevant. Indeed, the various arguments for and against net neutrality regulation are largely unchanged today. And between 2007 and the FCC's 2015 Order, no pervasive marketplace problem emerged. In fact, the FCC's 2015 Open Internet Order cited only four real-life examples of potentially problematic practices."[5] She further stated that in 2007, reclassifying broadband as a Title II common carrier services "was not even on the table."

Acting Chairman Ohlhausen added that through its complementary competition and consumer protection tools, the FTC is well-equipped to protect consumers online. The agency's antitrust mission serves to protect competition and provide protections for consumers, as well as the products and services they wish to access. The FTC's deception authority prohibits

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[2] Comments in Support of Proposed Rulemaking *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Hon. Garry R. Smith, District No. 27 – Greenville County, July 10, 2017.
[3] Ibid.
[4] "Broadband Connectivity Competition Policy," Federal Trade Commission, Staff Report, June 2007, https://ecfsapi.fcc.gov/file/10717290541490/FTC%20Broadband%20Connectivity%20Competition%20Report.pdf.
[5] Comments of Maureen K. Ohlhausen, Acting Chairman, Federal Trade Commission, In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, Federal Communications Commission, July 17, 2017, https://ecfsapi.fcc.gov/file/10717290541490/Ohlhausen%20Comment%20(7-17-2017).pdf.

companies from selling consumers one product or service but delivering another. As the Acting Chairman further noted, since ISPs have explicitly promised to adhere to net neutrality principles, their promises are now enforceable by the FTC, once its jurisdiction over them is restored through the NPRM. She further stated that the FTC is currently using its deception and unfairness authority to addressed alleged practices that are similar to those noted in the OIO. (Acting Chairman Ohlhausen's comments appear in Appendix B of this filing).

FCC Chairman Ajit Pai and Acting Chairman Ohlhausen issued a joint statement on March 1, 2017, that they would work together to bring a consistent approach to regulating internet privacy.[6] They said that jurisdiction over privacy and data security related to broadband providers should go back to the FTC, and that every actor "in the online space should be subject to the same rules, enforced by the same agency." They added, "The federal government shouldn't favor one set of companies over another … we will work together to establish a technology-neutral privacy framework for the online world. Such a uniform approach is in the best interests of consumers and has a long track record of success."

CAGW fully supports reinstating the classification of ISP services as "information services" under Title I of the Communications Act of 1934 and reducing the regulatory burdens on ISPs. Adoption of the NPRM will also lead to the return of consumer protection to the Federal Trade Commission and individual state attorneys generals.

[6] "Joint Statement of Acting FTC Chairman Maureen K. Ohlhausen and FCC Chairman Ajit Pai on Protecting Americans' Online Privacy," Federal Trade Commission, March 1, 2017, https://www.ftc.gov/news-events/press-releases/2017/03/joint-statement-acting-ftc-chairman-maureen-k-ohlhausen-fcc.

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Committees:
Chairman, Operations and Management
Ways and Means
Healthcare Subcommittee
Member, Legislative Audit Council

July 10, 2017

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street,
SW Room TW-B204
Washington, DC 20554

Re: Comments in Support Proposed Rulemaking *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108

Dear Secretary Dortch,

I am Garry Smith, Representative in the South Carolina House of Representatives for the 27th District. I reviewed the Notice of Proposed Rulemaking (NPRM) referenced by the docket number above and am submitting this comment in support of the Commission's efforts to reclassify broadband internet access services as an information service under Title I of the Telecommunications Act.[1]

I thought the Commission could use the perspective of a state legislator and of various entities responsible for protecting consumers in the State of South Carolina.

Introduction

Part of the NPRM, and the prior order it seeks to reverse,[2] discusses harms that either could be suffered by consumers or were suffered by consumers. The two orders present two different paradigms, with one paradigm assuming regulations should be based on actual harms suffered by

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[1] See e.g., 47 U.S.C. §§ 153(24), (53) and 230.
[2] *In the Matter of Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (hereafter "Title II Order").

consumers while the other paradigm averring regulations should be based on hypothetical harms consumers may endure.

To assist the Commission in reaching its decision, I asked the South Carolina Attorney General's Office and the Department of Consumer Affairs (DCA) several questions. Those questions were designed to answer the questions of what type of harms are consumers actually enduring and to help determine whether the relevant agencies received complaints regarding actual harms identified in the Title II Order prior to 2015, whether complaints increased after the Title II Order.

I believe the answers will demonstrate to the Commission that the consumer protection regime existing in South Carolina prior to the Title II Order is sufficient to protect consumers from any actual harm.

Summary

There are several instances in the NPRM where the Commission asked specific questions regarding consumer protections. Some of those questions asked whether Title II was necessary to protect against certain harms, whether hypothetical or actual. My goal was to discover what complaints consumers filed against ISPs in South Carolina in an attempt to figure out the concrete harms constituents face and how often those harms occur.

In summary, the State of South Carolina through the appropriate division of its Attorney General's office and the DCA identified a handful of internet-related complaints, most of which related to billing practices, internet service speed, or improper representations of available internet service speeds. The state entities were unable to identify any actual harms resulting from light-touch regulation. In fact, quite the contrary is true. The entities identified several specific instances of actual consumer harm, which harms ISPs addressed through the consumer complaint administrative process.

Contrary to the Title II Order, neither the State Attorney General's Office nor the DCA were able to identify consumer complaints relating to any of the Title II Order's recited hypothetical harms. Instead, the Attorney General's office and the DCA identified a flourishing and robust state consumer protection model, which addressed the real concerns of, and harms suffered by, South Carolina's hardworking residents.

The rest of this Comment is divided into several sections. First, I briefly address specific paragraphs piquing my interest in the NPRM; Second, I summarize and explain the responses to questions I received from the South Carolina DCA; and Thirdly, I summarize and explain the responses to questions I received from the South Carolina Attorney General's Office.

Specific Paragraphs in the NPRM Addressed

In paragraph 39 of the NPRM, the Commission stated its belief that "under Democratic and Republican leadership [it] was correct to classify broadband internet access service as an

information service." As part of the requests for comment from this paragraph, the Commission asks whether any actual harms, if any, resulted from light-touch regulation.

Neither the DCA nor the Attorney General's office were able to identify any actual harms resulting from the information service categorization of broadband internet access services. The types of harms consumers complained of pre- and post- Title II Order remained largely the same. These entities did not see an increase in consumer complaints filed as a result of the Title II Order.[3]

Similarly, in paragraph 50, the Commission observed the Title II Order focused extensively on hypothetical actions Internet service providers "might" take, and how those actions "might" harm consumers. The Commission asked a number of questions related to this observation. I wanted to focus on the broader observation and used the specific questions in the paragraph to guide my inquiries of the Attorney General's office and the DCA. To that end, I asked the Attorney General's office and the DCA if they encountered any complaints related to the specific hypothetical harms cited by the Title II Order.

Responses from the DCA
Consumer Complaints against ISPs Trends

I asked the DCA to divide responses to the questions into pre-Title II complaints and post-Title II complaints. For ease of reference, the "pre-Title II" period roughly corresponds to complaints received from 2009-2013/14 while the "post-Title II" period roughly corresponds to complaints received 2014/15-2016.

According to the DCA, a review of the complaints received both pre- and post-Title II indicates that it did not receive complaints about ISP blocking, throttling, or paid prioritization. The majority of the complaints during both periods were service or billing related. There were several complaints regarding internet service speeds or interruptions, but an examination of those complaints reveals none of them relate to blocking or throttling. The examples provided by the DCA are discussed in the next section.

According to DCA officials, the agency receives "approximately 4,000 complaints annually." This figure includes all complaints, not just internet or ISP-related complaints. From 2009-2013, the agency received roughly 164 internet-related complaints.[4] Based on the estimated number of annual complaints, during this five-year span, the agency would have received a total of roughly 20,000 complaints. Of those roughly 20,000 complaints, the 164 internet or ISP-related

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[3] Per an email from the DCA, cited below, information regarding complaints in South Carolina falls into two chronological categories. In 2014, the DCA "implemented a new online complaint system" that allowed officials "to obtain a lower level of detail for those most recently filed complaints. The data from 2009-2013 is not as granular.

[4] See email dated June 22, 2017 from Carri Lybarker, Esq., Administrator/Consumer Advocate at the SC Department of Consumer Affairs, attached as Appendix 1.

complaints represented less than one-percent of the total number of complaints the agency received. Further, of those 164 complaints, a majority of them related to billing issues.

From 2014-2016, less than one-percent of the "internet-related complaints" received by the DCA "were based on service [or] speed issues."[5] The remaining 99 percent related to "billing issues."

Specific Consumer Complaints against ISPs

The DCA provided copies of consumer, internet-related complaints. Each of the complaints has a companion response from the service provider. The response detailed the investigation conducted by the provider, an explanation of the underlying issue, and a description of the resolution.

The complaints may be divided into two categories: Pre-Title II Order (2014)[6] and Post-Title II Order (2015).[7] A review of the complaints demonstrates that the complaints received did not substantially change pre- and post- Title II Order.

Before the Title II Order, the complaints provided for 2014 all relate to internet service speeds. All the consumers complained that their ISPs were not delivering the speeds promised or represented. Two consumers complained they were promised 6 Mbps, but were only receiving a maximum of 1.3-1.5 Mbps. Other consumers paid for internet services of 60 Mbps but were receiving service at no more than one-tenth of the promised speeds.[8]

Based on the responses from the ISPs provided by the DCA, some problems related to customer expectations versus the service to which he subscribed, Other problems related to geography and infrastructure deployment, while other problems related provider equipment and network management issues.[9]

After the Title II Order in 2015, the complaints remained largely the same. At least one complaint addressed near constant service interruptions, while another complaint addressed data package capabilities. A third complaint addressed speeds and reliability.[10]

Once again, based on the responses from the ISPs provided by the DCA, the ISPs made every effort to remedy the problems. In two of the instances, the providers sent technicians to the residences and/or the nearby service stations. For both those instances, the providers did what they could to remedy the hardware or network problem. For another one of the complaints, the

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[5] *Id.*
[6] Copies of the Pre-Title II Consumer Complaints are attached at Appendix 2. The Complaints also include responses from the ISP.
[7] Copies of the Post-Title II Consumer Complaints are attached at Appendix 3. The Complaints also include responses from the ISP.
[8] See note 6, above.
[9] *See id.*
[10] See note 7, above.

service provider tried to remedy the issue, but the customer cancelled before it could send a technician to diagnose it.[11]

Information from the State Attorney General's Office

I asked the Attorney General's office some pointed questions regarding any potential complaints received regarding content blocking, whether ISPs restricted access to lawful content, restricted the use of apps or other software applications, and so on. While the specific response from the office is attached to this comment,[12] I will summarize the answers provided.

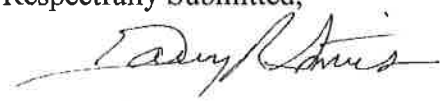
Broadly speaking, answers from the Attorney General's Office indicate South Carolinians have not experienced any of the hypothetical harms recited in the Title II Order. The Office has not received any complaints from 2003 through 2016 of any ISP blocking websites or restricting other content, preventing personal devices from connecting to a home network, LAN, or VPN. Similarly, the Office has not received any complaints that an ISP has harmed consumers by either blocking content from competitors or providing an unfair competitive edge for content or programming it generates.[13]

Conclusion

The Department of Consumer Affairs and the Attorney General's Office do yeomen's work protecting South Carolinians from harmful practices. The information received from these entities appear to reveal no problems prior to the Title II Order which would justify it. There is no evidence that the hypothetical harms recited by the Title II Order materialized at any time in South Carolina. The light touch regulatory scheme that existed before the Title II Order—that is to say, the dual state and federal consumer protection regimes—adequately protected South Carolinians when they encountered issues with ISPs.

Based on the information gleaned from these entities, it is my respectful opinion that the Commission's efforts to Restore Internet Freedom through the NPRM are grounded and will preserve the consumers' rights to seek redress through state and federal consumer protection agencies.

Respectfully Submitted,



Garry R. Smith

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[11] *See id.*

[12] *See* email dated on or about June 22, 2017 from John P. Hazzard, V, Deputy Attorney General and Special Counsel in the State Attorney General's Office, attached at Appendix 4.

[13] *See id.*

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	WC Docket No. 17-108
Restoring Internet Freedom	)	

To: The Federal Communications Commission
Date: July 17, 2017

Comment of Maureen K. Ohlhausen,
Acting Chairman, Federal Trade Commission

I write to support the Federal Communications Commission's Notice of Proposed Rulemaking (NPRM) on Restoring Internet Freedom.[1]

The FTC's Bureau of Consumer Protection, Bureau of Competition, and Bureau of Economics have filed a separate comment.[2] Their comment supports the NPRM's proposal to reverse the FCC's 2015 Title II classification of broadband internet access service (BIAS), noting that this will "restore the FTC's ability to protect broadband consumers under its general consumer protection and competition authority."[3] The comment also surveys the FTC's extensive privacy and data security expertise.[4] It explains that restoring FTC jurisdiction over BIAS providers will enable it to apply this privacy and data security expertise[5] and its general

[1] Restoring Internet Freedom, Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC 17-60 (released May 23, 2017), *published in* 82 Fed. Reg. 25568 (proposed June 2, 2017) [hereinafter NPRM].
[2] Comment of the Federal Trade Commission Bureau of Consumer Protection, Bureau of Competition, and Bureau of Economics, WC Docket No. 17-108 (filed July 17, 2017) [hereinafter Bureau Comment]. Due to the current status of the Commission, with only two Commissioners, the Bureaus are filing their comment without a Commission-level vote. Commissioner McSweeny has filed a separate comment that reflects her views.
[3] Bureau Comment at 2.
[4] *Id.* at 3-11.
[5] *Id.* at 12-21.

consumer protection authority.[6] Finally, it discusses how the FTC's competition authority would again apply to BIAS providers if the Title II classification were reversed.[7]

I fully support the Bureau Comment on these points. I comment separately to further highlight the FTC staff's long-standing position on the topic of net neutrality and to address several additional issues raised in the NPRM.

I. The Bipartisan 2007 FTC Staff Broadband Connectivity Competition Policy Report on Net Neutrality Regulation

Ten years ago, the FTC unanimously approved a report stating the FTC staff's position on net neutrality regulation.[8] Under Chairman Deborah Platt Majoras, I led the FTC's Internet Access Task Force, which was charged with evaluating issues related to internet access and net neutrality.[9] After holding a two-day workshop on these issues and gathering public comment, the Task Force drafted a report "focus[ed] on the consumer welfare implications of enacting some form of net neutrality regulation."[10] And in June 2007, the FTC unanimously adopted that report (2007 FTC Staff Report or Report). The findings and recommendations of that report remain highly relevant today. Indeed, several of the report's recommendations are borne out by market and regulatory developments during the past decade.

The 165-page report comprehensively examines the net neutrality issue circa 2007. It sets the foundation by describing the technical functioning of the internet and the legal and regulatory

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[6] *Id.* at 21-23.
[7] *Id.* at 23-29.
[8] FEDERAL TRADE COMM'N, *FTC Issues Staff Report on Broadband Connectivity Competition Policy*, https://www.ftc.gov/news-events/press-releases/2007/06/ftc-issues-staff-report-broadband-connectivity-competition-policy.
[9] FEDERAL TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY 1, June 2007 [hereinafter Broadband Report], https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf.
[10] *Id.* at 4.

developments driving the debate in 2007. (Chs. I & II) It then catalogs the various arguments for and against net neutrality. (Ch. III)

Next, the report analyzes the consumer welfare effects of potential conduct by internet service providers (ISPs). After examining various types of vertical integration of broadband with internet services (Ch. IV), the report concludes that, consistent with well-established antitrust and economic principles, vertical integration has the potential to benefit or harm consumers and competition, depending on the circumstances.[11] While integration could prompt blocking, degrading, and higher prices, it could also offer procompetitive and pro-consumer efficiencies, such and facilitating infrastructure investment and spurring the entry of new competitors. Similarly, after evaluating a wide variety of possible data prioritization techniques (Chs. IV & V), the report determines that such techniques promise significant benefits to consumers and competition but also have some risks depending on the specific technique and use.[12]

The report then evaluates the current and likely future state of competition in broadband internet access. (Ch. VI) At that time, as today, there was considerable debate about the level of competition in the broadband market. This is an important question. Many of the potential harms to consumers or competition are premised on market power, and nearly all arguments for net neutrality regulation assert a lack of sufficient broadband competition. The report emphasizes the importance of determining the state of competition through careful product and market definition, including analysis of the disciplining effect of substitutes and potential entrants.[13]

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[11] *Id.* at 82.
[12] *Id.* at 96-97.
[13] *Id.* 99-100, 104-05.

Ten years later, however, despite the centrality of market power analysis to arguments for regulation, most broadband market competition analysis is even less rigorous than in 2007. Many advocates casually conclude that BIAS providers have market power or are monopolists.[14] Others cite the national percentage of consumers with access to one wireline broadband service at an arbitrary speed threshold as the primary or sole data point needed to demonstrate market power.[15] This imprecision in the current debate may reflect the FCC 2015 Order's wholesale rejection of market power analysis.[16] I agree with the 2007 FTC Staff Report's recommendation that a decision to adopt net neutrality regulation should be based on a rigorous market power analysis.

Having analyzed the core policy issues in the net neutrality debate, the 2007 FTC Staff Report turns to the application of antitrust and consumer protection law to various potential BIAS provider practices and business arrangements. (Chs. VII & VIII) It then outlines the various regulatory, legislative, and other proposed solutions. (Ch. IX)

Finally, based on all of the previous analysis, the 2007 FTC Staff Report offers guiding principles for policy makers "to consider prior to enacting any new laws or regulations" regarding net neutrality.[17] (Ch. X) Specifically, the report concludes:

> "Policy makers should be wary of calls for network neutrality regulation simply because we do not know what the net effects of potential conduct by broadband providers will be

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[14] *See* John Gasparini, "Fact-Checking ISPs' Claims of Support for Net Neutrality," https://www.publicknowledge.org/news-blog/blogs/fact-checking-isps-claims-of-support-for-net-neutrality ("[T]hese monopolistic, noncompetitive companies keep insisting they love net neutrality..."); Free Press, Press Release, "FCC Commissioner Pai Is Dead Wrong on Investment and Net Neutrality," Feb. 29, 2016, https://www.freepress.net/press-release/107327/fcc-commissioner-pai-dead-wrong-investment-and-net-neutrality.

[15] Tom Wheeler, Chairman, Federal Commc'ns Comm'n, Prepared Remarks at 1776 Headquarters: The Facts and Future of Broadband Competition 4, (Sept. 4, 2014) ("At 25 Mbps, there is simply no competitive choice for most Americans."), https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf.

[16] *See* In the Matter of Protecting & Promoting the Open Internet, 30 FCC Rcd 5601, 5633 (2015); *see also* Maureen K. Ohlhausen, *Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119, 129 (2016).

[17] Broadband Report at 5.

> on consumers, including, among other things, the prices that consumer may pay for Internet access, the quality of Internet access and other services that will be offered, and the choices of content and applications that may be available to consumers in the marketplace."[18]

In fact, as the Report explains, broadband providers, even *assuming* they have market power, face mixed incentives.[19] Some align with subscribers' interests and some are contrary, and "[i]n the abstract, it is not possible to know which of these incentives would prove stronger."[20] The Report explains that many of the practices involved are the types of vertical arrangements that economists generally, but not always, find to improve consumer welfare.[21] According to the Report, providers' competing incentives "raise complex empirical questions and may call for substantial additional study" of the general or local market or of specific transactions.[22]

Having explained the difficulty of evaluating the net consumer welfare effects of various practices *ex ante*, the Report expresses concern about the "potentially adverse and unintended effects of regulation… particularly those imposing general, one-size-fits-all restraints on business conduct."[23] For example, the Report notes that regulation "could result in a long-term decline in investment and innovations in broadband networks," because "providers that cannot differentiate their products or gain new revenue streams may have reduced incentives to upgrade their infrastructure."[24] The Report argues that these concerns are heightened in the broadband industry, which is relatively young, quickly evolving, and moving in the direction of more, not less, competition.[25]

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[18] Broadband Report at 157.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 70.
[22] *Id.* at 82.
[23] *Id.* at 159-60.
[24] *Id.* at 160.
[25] *Id.*

After cautioning against prescriptive regulation, the Report explains that the FTC will "continue to devote substantial resources to maintaining competition and protecting consumers … in the area of broadband Internet access."[26] In enforcing the antitrust laws, "because the various conduct and business arrangements at issue in the broadband area have both procompetitive and anticompetitive potential, the FTC would carefully analyze the net effect of particular conduct or arrangements on consumer welfare, rather than challenge them as *per se* illegal."[27] The Report also states that the FTC will continue active consumer protection enforcement. In particular, the Report suggests that providers should clearly and conspicuously disclose the material terms of broadband internet access, particularly if they engage in various traffic-shaping practices.[28]

Ten years later, the 2007 FTC Staff Report remains remarkably relevant. Indeed, the various arguments for and against net neutrality regulation are largely unchanged today.[29] And between 2007 and the FCC's 2015 Order, no pervasive marketplace problem emerged. In fact, the FCC's 2015 Open Internet Order cited only four real-life examples of potentially problematic practices.[30]

However, a few important things have changed. Over that ten-year span, broadband speed has accelerated and – with mobile – taken flight. Broadband speeds over the past 10 years have soared, with average *wireless* 4G LTE speeds today more than three times faster than

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[26] *Id.* at 161.
[27] *Id.* at 161-62.
[28] *Id.* at 162.
[29] See *id.* at 51-69 (summarizing arguments for and against net neutrality regulation).
[30] *See generally* Timothy Brennan, *The Post-Internet Order Broadband Sector: Lessons from the Pre-Open Internet Order Experience*, 50 REV. IND. ORGAN. 469 (2016) (discussing the four examples at length), *available at* https://link.springer.com/article/10.1007/s11151-016-9551-y.

average *wireline* speeds were in 2007.[31] But probably the biggest marketplace difference is the rise of mobile internet access. The first iPhone hit the market in June 2007 (the same month the FTC released its report) and mobile internet usage has since exploded. By late 2016, mobile visits to websites exceeded desktop visits worldwide, and in the U.S. more than 42% of U.S. webpage visits were from mobile devices.[32] Mobile devices can and do easily switch between Wi-Fi and wireless provider networks, suggesting that the four national and numerous regional wireless providers (as well as countless Wi-Fi hotspot providers) likely already discipline wireline broadband provider behavior. And the next generation of wireless technology promises speed and performance that rival even advanced wireline networks.[33] These developments further support the 2007 Staff Report's observation of a trend toward more broadband competition.[34]

A less positive change since 2007 provides the main impetus of the NRPM: the tool the FCC chose to implement net neutrality rules. To adopt rules in 2015, the FCC reclassified broadband as a common carrier service under Title II of the Communications Act. Yet in 2007, reclassifying broadband as a Title II service was not even on the table.[35] Indeed, in 2007,

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[31] As of Q1 2007, average U.S. wireline broadband speeds only totaled 4.8 Mbps [download]. *See* ITIF, ASSESSING BROADBAND IN AMERICA 4 (Apr. 2007), http://www.itif.org/files/BroadbandRankings.pdf. By Q1 2017, average U.S. wireline broadband speeds had almost quadrupled, reaching 18.7 Mbps. *See* Akamai, STATE OF THE INTERNET REPORT 12 (May 2017), https://www.akamai.com/fr/fr/multimedia/documents/state-of-the-internet/q1-2017-state-of-the-internet-connectivity-report.pdf. Meanwhile, mobile broadband speeds are nearly 40x faster than in 2007, with average 4G LTE speeds approaching 17 Mbps – more than three times the previously mentioned average *wireline* speed in 2007. *See* CTIA, WIRELESS SNAPSHOT 2017 4 (May 2017), https://www.ctia.org/docs/default-source/default-document-library/ctia-wireless-snapshot.pdf.

[32] *Mobile and Tablet Internet Usage Exceeds Desktop for First Time Worldwide*, STATCOUNTER (Nov. 1, 2016), http://gs.statcounter.com/press/mobile-and-tablet-internet-usage-exceeds-desktop-for-first-time-worldwide.

[33] *See, e.g.*, *Makeover for Mobile Phones*, THE ECONOMIST (Apr. 20, 2017), https://www.economist.com/news/science-and-technology/21720916-ready-or-not-5g-wireless-preparing-its-big-day-makeover-mobile-phones ("[I]f it lives up to expectations, 5G wireless could put some fixed-line internet connections to shame, even at the lower end of its performance range.").

[34] Broadband Report at 160, Chapter VI.B.

[35] Broadband Report at 139 n.683 (quoting Gigi Sohn, "I don't know anybody who is talking about going back to Title II … [T]hat is not what this debate is about.").

stakeholders on all sides of the issue recognized the negative impact a Title II approach would have on FTC jurisdiction and emphasized the importance of FTC jurisdiction over BIAS providers.[36]

The 2007 FTC Staff Report warned about the potential adverse consequences of regulation. While a healthy debate rages about other effects of the 2015 Order, one negative side effect cannot be disputed: the 2015 Order stripped the FTC of jurisdiction over broadband providers, creating a consumer protection gap that remains unfilled.[37]

Together, the developments over the past ten years demonstrate that the FTC was correct in its unanimous, bipartisan 2007 recommendation that regulators "proceed[] with caution before enacting broad, *ex ante* restrictions in an unsettled, dynamic environment."[38] Today, there is still no evidence of sustained injury to consumers or to competition. Instead, the internet ecosystem has remained vibrant over the past decade. And the most indisputable side effect of the 2015 Order, the stripping of FTC jurisdiction, is a clearly an adverse outcome for consumers.

A unanimous, bipartisan FTC approved the 2007 FTC Staff Report. What was good advice in 2007 remains good advice ten years later. I reiterate that advice today by filing the Report as an attachment to this comment.

II. The FTC's Tools are Capable of Protecting Consumers and Competition Online

The FTC's dual mission is to protect consumers and promote competition. The essence of this mission is to ensure that consumers can efficiently pursue their many, varying market preferences, whether those preferences are for low prices, new goods, or certain features such as

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[36] *See generally* Broadband Report at 138-40.

[37] In late 2016, the FCC adopted a set of privacy rules for BIAS providers, which never went into effect. Those rules were flawed and still left a substantial consumer protection gap. *See, e.g.*, Maureen Ohlhausen, Acting Chairman, Federal Trade Comm'n, Remarks of Acting Chairman, Keynote Address at Internet Privacy: Technology and Policy Developments, (May 1, 2017), https://www.ftc.gov/system/files/documents/public_statements/1213203/ohlhausen_-_internet_privacy_remarks_rayburn_hob_5-1-17.pdf.

[38] Broadband Report at 155.

neutrality. The FTC's complementary competition and consumer protection tools work together to protect consumers and competition online.

A. Antitrust Protects Competition, Which Drives Firms to Match Consumer Preferences

The FTC's antitrust tools are powerful protectors of market competition. The FTC's antitrust authority can and has addressed a wide range of harmful behavior across a nearly all U.S. industries. As highlighted in the Bureau Comment, some of the harmful practices that the FTC can address include: foreclosing rival content in an exclusionary or predatory manner; problematic conduct relating to access, discrimination, pricing, bundling, and regulatory evasion; harmful exclusive contracts; agreements between competitors to fix prices, reduce output, or allocate customers; and problematic vertical mergers that could deny competitors access to essential inputs or to downstream distribution outlets.[39] Many of the practices that concern advocates of net neutrality regulation fall within one or more of these categories of anticompetitive actions and therefore could be addressed by the FTC's antitrust enforcement.

Furthermore, these antitrust tools do not solely protect attributes such as price and output. Instead, antitrust protects competition, which delivers the qualities that consumers demand. Therefore, antitrust can help protect any feature or quality that consumers demand, including free speech and democratic participation. Advocates vigorously argue, citing surveys, anecdotes, and counts of comments filed, that consumers place great value in the equal treatment of data by ISPs.[40] In that case, any ISP that systemically degrades applications and content that its subscribers demand will face a consumer backlash. There is strong evidence that edge providers

[39] Bureau Comment at 23-29.

[40] *See* Harper Neidig, *Poll: GOP Voters Support Net Neutrality Rules, Oppose AT&T-Time Warner Merger*, THE HILL (Jul. 13, 2017), http://thehill.com/policy/technology/341850-poll-gop-voters-support-net-neutrality-rules-oppose-att-time-warner-merger; *see also* Elliot Harmon, *Historic Day of Action: Net Neutrality Allies Send 1.6 Million Comments to FCC*, ELEC. FRONTIER FOUND. (Jul. 12, 2017), https://www.eff.org/deeplinks/2017/07/net-neutrality-allies-send-16-million-comments-fcc.

are quite capable of mobilizing their customers to make known their demands.[41] Indeed, the limited number of non-neutral practices even before the 2015 Order suggests that ISPs are already accommodating consumer demands. In such circumstances, there may not be a need for regulation. In fact, prescriptive regulation risks cementing in place practices that may need to evolve as consumer preferences change. I have addressed these issues at further length in a journal article, which I also attach.[42]

B. Consumer Protection

Likewise, the FTC's consumer protection tools are also powerful protectors of the market. We use our consumer protection tools to protect the integrity of the mutual beneficial exchange at the heart of the market process, by stopping practices that subvert that exchange. These tools are as applicable to the provision of broadband service as to every other industry.

The practices that concern advocates of net neutrality regulation involve consumer protection issues. For example, much of the concern about Comcast's alleged treatment of certain BitTorrent streams was that it was not apparent to consumers, and therefore Comcast allegedly deceived consumers about the service they purchased.[43] Indeed, according to the D.C. Circuit, the "upshot" of the 2015 Order is to "fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful internet."[44]

The FTC's consumer protection tools are well suited to ensure the fulfillment of consumers' reasonable expectations about their broadband service. Our deception authority

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[41] Harmon, *supra* note 40.
[42] Ohlhausen, *supra* note 16, at 119.
[43] *See* Fred von Lohmann, *FCC Rules Against Comcast for BitTorrent Blocking*, ELEC. FRONTIER FOUND. (Aug. 3, 2008), https://www.eff.org/deeplinks/2008/08/fcc-rules-against-comcast-bit-torrent-blocking (referring to the blocking as "surreptitious"); Ryan Singel, *Comcast Sued Over BitTorrent Blocking – Updated*, WIRED (Nov. 14, 2007), https://www.wired.com/2007/11/comcast-sued-ov/ (citing court complaint filed that alleges false and misleading advertising by Comcast).
[44] United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir 2016), *reh'g en banc denied*, United States Telecom Ass'n v. FCC, 855 F.3d 381, 389 (D.C. Cir. 2017) (concurring statement of Judge Srinivasan and Judge Tatel).

prohibits companies from selling consumers one product or service but providing them something different. It ensures consumers get what they were promised. Notably, many major BIAS providers have now explicitly promised to adhere to net neutrality principles.[45] These kinds of promises are enforceable by the FTC, assuming it has jurisdiction over the BIAS provider. Our deception authority also requires companies to disclose material information if not disclosing it would mislead the consumer.[46] Therefore, if a broadband provider failed to disclose blocking, throttling, or other practices that would matter to a reasonable consumer, the FTC's deception authority would apply.

In addition to deception, the FTC's unfairness authority prohibits practices, even absent any promise, where the actual or likely consumer injury is substantial, unavoidable by the consumer, and not outweighed by benefits to consumers or to competition. The FTC has used this authority to hold liable companies that unilaterally change their past promises to consumers even where there was no deception.[47]

Indeed, the FTC is currently using both its deception and unfairness authority to address alleged practices similar to net neutrality violations. In its case against AT&T Mobility, the FTC alleges that the wireless provider deceptively and unfairly "misled millions of its smartphone customers by charging them for 'unlimited' data plans while reducing their data speeds, in some

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[45] *See* John Eggerton, *NCTA Places 'Washington Post' Ad Committing to Open Internet*, BROADCASTING & CABLE (May 17, 2017), http://www.broadcastingcable.com/news/washington/ncta-places-washington-post-ad-committing-open-internet/165896. And the D.C. Circuit has suggested that if an ISP discloses that it is not a neutral, indiscriminate conduit to the internet, it is not subject to the rules in FCC's 2015 Order. *See* 855 F.3d at 389; *see also* Daniel Lyons, *Can ISPs Simply Opt Out of Net Neutrality?*, FORBES (May 15, 2017), https://www.forbes.com/sites/washingtonbytes/2017/05/15/can-isps-simply-opt-out-of-net-neutrality/.

[46] FEDERAL TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION 3 (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

[47] Orkin Exterminating Co., Inc., 108 F.T.C. 263 (1986); *aff'd.*, FTC v. Orkin, 849 F.2d 1354 (11th Cir. 1988).

cases by nearly 90 percent."[48] That litigation continues, but provides a good example of the FTC's willingness to apply our consumer protection authority to a complex technical practice of a network provider that harms consumers.

C. Advantages of Enforcement Approach

Both of these market-preserving tools – antitrust and consumer protection – have structural advantages over prescriptive rules. Both rely on case-by-case enforcement, applying general legal principles to specific facts, constrained by certain institutional features and a focus on addressing real harm. And in both areas, the FTC can take action where private litigants would lack the incentives or resources to bring a case.

In dynamic, innovative industries like internet services, an *ex post* case-by-case enforcement-based approach has advantages over *ex ante* prescriptive regulation. It mitigates the regulator's knowledge problem and allows legal principles to evolve incrementally.[49] A case-by-case approach also focuses on actual or likely, specifically-pled harms rather than having to predict future hypothetical harms.

Of course, case-by-case enforcement without constraining principles and processes is problematic. FTC enforcement seeks to balance flexibility and predictability. Our antitrust and consumer protection enforcement rely on long-standing legal precepts that are themselves hemmed in by case law, statute, and by our own policy statements. Our complaints and settlements are analyzed not just by lawyers but also by our Bureau of Economics and must be approved by the Commissioners. These institutional features build consensus and limit overreach. And perhaps most importantly, the FTC focuses on harm to consumers and to

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[48] FEDERAL TRADE COMM'N, *FTC Says AT&T Has Misled Millions of Consumers with 'Unlimited' Data Promises*, https://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-misled-millions-consumers-unlimited-data.

[49] *See* Maureen K. Ohlhausen, *The FCC's Knowledge Problem: How to Protect Consumers Online*, 67 FED. COMM. L.J. 203 (Apr. 2015), https://www.ftc.gov/system/files/documents/public_statements/818521/1509fccohlhausen.pdf.

competition, both when considering whether to bring a case and in calculating remedies. Focusing on harm not only ensures that FTC enforcement actually makes consumers better off, it also creates more business certainty.

Some have criticized the FTC's case-by-case approach as reactive, with no capability to prevent future injuries. Yet civil law enforcement has always served as both a *corrective* for the specific behavior of the defendant as well as a *deterrent* against similar future actions by the same or other actors. Like the common law, the FTC's process of applying general principles to specific facts enables flexibility yet yields outcomes that serve as guidance for future compliance, as those familiar with the FTC's case law recognize.[50] Furthermore, even prescriptive rules must be enforced, and the outcomes of such enforcement actions are not inherently predictable, particularly when the prescriptive rules are out of date or applied to technologies and business models that were not contemplated when the rules were adopted.

III. A Benefit-Cost Analysis Ought to Consider the Wide Range of Existing Tools to Address Net Neutrality-Related Concerns, Should They Arise

The FCC has sought analysis of the costs and benefits of the various proposals in the NPRM.[51] Quite appropriately, the NPRM states that such analysis ought to compare the effects of today's status quo regulation to the effects of protections that would remain in place if the proposals were adopted.[52] This "but for" world ought to include market mechanisms, facilitated by long-standing competition and consumer protection law enforced by the FTC, the Department of Justice, state attorneys general, and private litigants. The FTC Bureau comment and my comment have described the FTC's powerful tools to protect consumers and competition.

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[50] *See, e.g.*, Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 621-22 (2014).
[51] NPRM ¶ 105.
[52] NPRM ¶ 106.

This comment (and my attached paper) further describe some of the market forces that incentivize firms to match consumer preferences, including non-pecuniary values. The FCC also ought to include in its baseline the capability of advocacy groups to rally grassroots action for various "net neutrality" causes. This advocacy serves as a strong constraint on the ability of BIAS providers to violate norms these groups support. Indeed, the potent reactions to past actions by BIAS providers have demonstrated the potential of such market feedback mechanisms to affect firm behavior.[53]

IV. Conclusion

For the reasons described in the comments above and the documents attached, I urge the FCC to return broadband internet access service to a Title I classification and to take other actions consistent with this submission.

[53] *See, e.g.*, Adam Liptak, *Verizon Reverses Itself on Abortion Messages*, N.Y. TIMES (Sept. 27, 2007), http://www nytimes.com/2007/09/27/business/27cnd-verizon html.